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TRANSCRIPT OF RECORD,

Supreme Court of the United States

OCTOBER TERM, 1944

No. 37

TOM TUNSTALL, PETITIONER,

vs.

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN, OCEAN LODGE No. 76, PORT NOR-
FOLK LODGE No. 775, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 10, 1944.

CERTIORARI GRANTED MAY 29, 1944.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

Appendix to Brief for Appellant

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA (NORFOLK DIVISION)

Civil Action No. 210

TOM TUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia and Ocean Lodge, No. 76, Norfolk,
Virginia and Port Norfolk Lodge, No. 775, Portsmouth,
Virginia and W. M. Munden, 1123 Hawthorn Avenue,
Norfolk, Virginia and Norfolk Southern Railway Com-
pany, a corporation, Norfolk, Virginia, Defendants.

COMPLAINT FOR DAMAGES CAUSED BY REFUSAL OF AGENT
UND. 3 THE RAILWAY LABOR ACT TO REPRESENT, FOR DAM-
AGES FOR FRAUD, FOR INJUNCTION AND FOR A DECLARATORY
JUDGMENT—Filed August 11, 1942

1. This Action arises under the Act of Congress, June
21, 1934, 48 Stat. 1185; U. S. C., Title 45, Chapter 8; U. S.
[fol. 2] C., Title 28, Section 41 (8); U. S. C., Title 28, Sec-
tion 400; and Federal Rules of Civil Procedure, Rule 17
(b); 23 (a), and 57; as hereinafter more fully appears.

COUNT 1

2. Plaintiff, Tom Tunstall, is a Negro citizen of the
United States and of the State of Virginia. He sues in this
Count in his own right for damages inflicted upon him
individually.

3. The defendant, Brotherhood of Locomotive Firemen
and Enginemen (hereinafter called the Brotherhood) is an
international unincorporated association whose mem-
bership is derived principally from white firemen and engine-
men employed on interstate railroads, including the Nor-
folk Southern Railroad and its successor in interest, the

Norfolk Southern Railway; is the Representative, under the Railway Labor Act, 1934, 48 Stat. 1185, U. S. C. Title 45, Chapter 8, of the craft or class of locomotive firemen employed on said Railroad and is sued as such. It is composed of a Grand Lodge and over nine hundred subordinate lodges, including the defendant subordinate lodges, which are too numerous to make it practicable to bring them all before the Court. The subordinate lodges are also unincorporated associations, each composed of numerous individual locomotive fireman, and it is likewise impracticable to bring them all before the Court. The Brotherhood has a national treasury derived from membership dues and otherwise. By constitutional provision, ritual and practice it restricts its membership to white locomotive firemen and enginemen. Plaintiff is excluded therefrom solely because of race.

4. The defendants, Ocean Lodge, No. 76 and Port Norfolk Lodge, No. 775, are subordinate lodges of the defendant Brotherhood having their locations in Norfolk, Virginia, and Portsmouth, Virginia, respectively, within the [fol. 3] jurisdiction of this Court. The business of each subordinate lodge is managed by a President, Recording Secretary, Legislative Representative, Local Organizer and Local Chairman. The members of the defendant subordinate lodges are either employed by the Norfolk Southern Railroad Company, and directly involved in the matters herein complained of, or are members of the defendant Brotherhood resident within the jurisdiction of this court. Upon information and belief plaintiff alleges that the defendant subordinate lodges constitute all of the lodges of the defendant Brotherhood within the territorial limits of the Norfolk Division of the United States District Court for the Eastern District of Virginia, and are truly and fairly representative of the remaining lodges of the Brotherhood and of the Brotherhood itself, and the interest of all the members, subordinate lodges and the Brotherhood will be adequately represented in the premises by the defendants of record. The defendant subordinate lodges are sued as representatives of the membership, all the subordinate lodges and the Brotherhood itself.

5. The defendant, W. M. Munden, is a white locomotive fireman employed by the Norfolk Southern Railroad and

its successor in interest, the Norfolk Southern Railway; is a member of the defendant Brotherhood who, because of the wrongs inflicted by the Brotherhood upon plaintiff and his class, gained certain advantages and considerations which rightfully belong to plaintiff as hereinafter will appear more fully. He is Local Chairman of defendant Ocean Lodge, No. 76, and acts for the Brotherhood in enforcing the schedule of rules and working conditions and in matters of grievance adjustments and job assignments on the Northern Seniority District of said Railroad. He is sued in his own right and as a representative of the members of the Brotherhood, particularly those employed on the Norfolk Southern Railroad and its successor in interest, the Norfolk Southern Railway Company.

[fol. 4] 6. At all times material herein the defendant Brotherhood has been the representative under the Railway Labor Act aforesaid of the entire craft or class of locomotive firemen employed by the Norfolk Southern Railroad Company and its successor in interest the Norfolk Southern Railway Company, and, as such, under a duty under said Act to represent the members of said craft or class impartially and to refrain from using its position to destroy their job assignments and other rights. On or about October 10, 1941, plaintiff was working for the Norfolk Southern Railroad Company as a locomotive fireman on a passenger run on its Northern Seniority District, running between Norfolk, Virginia and Marsden, North Carolina, under an individual contract of hiring, and was a member of the craft or class of locomotive firemen employed by said Railroad Company. Said run constituted one of the more Preferred jobs available to locomotive firemen employed by said Railroad Company. On or about said October 10, 1941, in order to secure for its own members the more favorable job assignments available to locomotive firemen employed by the Norfolk Southern Railroad Company, the defendant Brotherhood failed and refused to represent plaintiff impartially as was its duty under the Railway Labor Act, but on the contrary, acting in the premises as representative of the entire craft or class under the Railway Labor Act wrongfully used its position to induce and force the Norfolk Southern Railroad Company to remove him from his job assignment and replace him with one of its own members.

7. As a result whereof plaintiff lost his job assignment as a locomotive fireman on said passenger run and, in order to continue in his employment, was forced to accept and perform a less desirable assignment in yard service, where the hours are longer and the work more arduous and difficult.

Wherefore, plaintiff demands judgment against the defendant Brotherhood in the amount of \$25,000, and costs.

[fol. 5]

Count II

1. Plaintiff adopts all of the allegations of paragraphs 2, 3, 4, and 5, of Count I. He sues herein his individual capacity for wrongs inflicted on his individual rights; and as representative of all of the Negro firemen employed by the Norfolk Southern Railroad Company, and its successor in interest, the Norfolk Southern Railway Company. Said Negro firemen constitute a class too large to be brought individually before the Court, but there are common questions of law and fact involved herein, common grievances arising out of common wrongs, and common relief for the entire class is sought as well as special relief of this plaintiff; and the interests of said class are fairly and adequately represented by plaintiff.

2. The defendant, Norfolk Southern Railway Company, hereinafter called the Railway Company is a corporation, incorporated in the State of Virginia and is engaged in Interstate Commerce, having its principal place of business in Norfolk, Virginia. It maintains and operates the system or lines of railroads formerly operated by the Norfolk Southern Railroad Company, which was also a corporation incorporated in the State of Virginia. By virtue of the Plan of Reorganization and Reorganization Agreement approved May 14, 1941, the Norfolk Southern Railway Company, assumed all contracts, leases, operating agreements, licenses or permits entered into by the Norfolk Southern Railroad Company, or modified or entered into by the Receivers thereof, not disaffirmed within such time as should be fixed by the Court. On or about January 21, 1942, the Norfolk Southern Railway Company, pursuant to said Plan of Reorganization and Reorganization Agreement, began maintaining and operating the system or lines of railroads formerly operated by the Norfolk Southern

Railroad Company and the agreements and contracts hereinafter mentioned have never been disaffirmed by said Railroad [fol. 6] way Company but have been adopted by said Company and are still in full force and effect, and wherever the terms "Railway" or "Railway Company," or "railroad" are used herein with reference to matters occurring prior to January 21, 1942, said terms refer to the Norfolk Southern Railroad Company and/or its Receivers; if said matters occurred subsequent to January 21, 1942, said terms refer to the Norfolk Southern Railway Company, assignee and successor in interest to the Norfolk Southern Railroad Company.

3. The Negro firemen constitute the minority of the total number of firemen employed by the defendant Railway Company. The white locomotive firemen, all of whom are members of the defendant Brotherhood, constitute the majority of the total number of locomotive firemen employed by the defendant Railway Company. The Negro firemen and the Brotherhood members comprise the entire craft or class of firemen employed by the defendant Railway. By constitutional provision, ritual and practice the Brotherhood restricts its membership to white locomotive firemen, the Negro locomotive firemen, including plaintiff and the class he represents being excluded therefrom solely because of race.

4. By virtue of the fact that they constitute the majority of the total number of locomotive firemen employed by the defendant Railway, the Brotherhood members ever since the passage of the Federal Railway Labor Act, June 21, 1934 (48 Stat. 1185, c. 691, 45 U. S. C. c. 8), have chosen the defendant Brotherhood as the representative of the craft or class of firemen employed on defendant Railway, and the Brotherhood has accepted said position and has ever since claimed the exclusive right to act and has purported to act as the exclusive bargaining agents and grievance representative of the entire craft or class aforesaid and its members have individually and collectively claimed the benefits of the actions of the Brotherhood as said representative. Neither plaintiff nor any of the Negro locomotive firemen employed by the defendant Railway Company has chosen the Brotherhood as his representative but by virtue of the fact that the Brotherhood's members constitute the majority of the craft or class of locomotive

firemen, employed by the Railway, plaintiff and the other Negro locomotive firemen, are compelled under the Railway Labor Act, to accept the Brotherhood as their representative for the purposes of the act.

3. As members of the craft or class of locomotive firemen employed by the defendant Railway Company, and being forced by the Railway Labor Act, to accept the representative chosen by the majority as their representative, plaintiff and the other Negro locomotive firemen have the right to be represented fairly and impartially and in good faith by the representative chosen by said majority. By accepting the position of representative under the Railway Labor Act, of the entire craft or class of locomotive firemen, and by asserting the exclusive right to act as such representative, defendant Brotherhood became the statutory agent of plaintiff and the other Negro minority members of said craft or class and under the obligation and duty to represent them fairly and impartially and in good faith; to give them reasonable notice, opportunity to be heard and a chance to vote on any action adverse to their interests proposed by it; to make prompt and full disclosure of all actions taken by it affecting their interests in any way, and to refrain from using its position as their statutory representative to discriminate against them in favor of itself and its members and from destroying their rights.

Nevertheless, in violation of its obligations and duties the defendant Brotherhood has been persistently hostile and disloyal to plaintiff and the other minority nonmember Negro locomotive firemen, and has constantly sought to destroy their rights and to drive them out of employment in order to create a monopoly of the employment [fol. 8] and the most favored jobs and conditions for its own members. It has always refused and still refuses to notify plaintiff and the other Negro firemen, members of the craft or class, of proposed actions adversely affecting their interests or to give them a chance to be heard or to vote on same. It has constantly refused and still refuses to report to him or them its actions as their statutory representative or to handle their grievances wherever there is an apparent conflict or interest between them and its members; and has always refused and still refuses to

give him and them fair, impartial, honest and faithful representation under the Railway Labor Act.

6. On or about March 28, 1940, the Brotherhood, purporting to act in the premises as the representative under the Railway Labor Act, of the entire craft or class of locomotive firemen employed on the Norfolk Southern Railroad and other railroads in the Southeastern section of the country, but acting in breach of its duties and in fraud of the rights of plaintiff and the other Negro locomotive firemen, members of the craft or class, caused notice to be served on said railroads, including the defendant railroad, of its desire and purpose to amend existing collective bargaining agreements covering the standard provisions of the individual hiring contracts of the individual firemen on each railroad, including the defendant railroad, in such manner as would drive the Negro firemen, including plaintiff, completely out of the service of said railroads. A copy of said Notice is attached hereto as Exhibit I and incorporated in full herewith.

7. On or about February 18, 1941, pursuant to said Notice, the Brotherhood, purporting to act as the exclusive representative under the Railway Labor Act of the entire craft or class of locomotive firemen employed on defendant railroad and other railroads in the Southeastern section of the country, did wrongfully prevail upon defendant [fol. 9] Railway Company to enter into agreement, and did wrongfully negotiate an agreement with the defendant Railway Company whereby the proportion of non promotable firemen, and helpers on other than steam power, should not exceed fifty per cent in each class of service established as such by the carrier, and providing that until such percentage was reached on any seniority district all new runs, and all vacancies created by death, dismissal, resignation or disqualification should be filled by promotable men; and further providing that non-promotable men were those who were not in line for promotion under the present rules and practices to the position of locomotive engineer. A copy of said agreement of February 18, 1941, is attached here as Exhibit II and incorporated herewith. Plaintiff alleges that under the rules and practices in effect that the time that this contract was entered into and at the present time, all Negro locomotive firemen, including plain-

tiff, as a class, are arbitrarily considered ineligible for the position of locomotive engineer and are arbitrarily classified as non promotable.

8. On or about May, 23, 1941, the Brotherhood, again purporting to act in the premises as the exclusive representative under the Railway Labor Act of the entire craft or class, but acting in fraud of the rights of plaintiff and the other Negro minority firemen, and in breach of its duty to them, caused said agreement to be supplemented to provide specifically that the term "nonpromotable firemen" used therein referred only to colored firemen. A copy of said agreement as supplemented is attached hereto as Exhibit III and incorporated herewith.

9. In serving said Notice of March 28, 1940, and in entering into the Agreement of February 18, 1941, and supplement of May 23, 1941, the defendant Brotherhood, although purporting to act as the exclusive representative of the entire craft or class of locomotive firemen employed [fol. 10] on defendant railroad, gave plaintiff and the other Negro minority firemen no notice thereof or opportunity to be heard or vote thereon; nor was the existence of said agreement and supplement disclosed to them until the Brotherhood forced plaintiff off his run by virtue thereof, as hereinafter will appear more fully; but the Brotherhood, well knowing plaintiff's and the other Negro firemen's interest therein, and maliciously intending and contriving to secure a monopoly of employment and the most favorable jobs for its own members, acted in fraud of the rights of plaintiff and the other Negro firemen and failed and refused to represent them fairly and impartially as was its duty as their representative under the Railway Labor Act.

10. On the date that said agreement and supplement went into effect the defendant railway company operated passenger train service on its Northern Seniority District, running between Norfolk, Virginia and Marsden, North Carolina. Two firemen were used in said service one of whom was a white member of defendant Brotherhood and the other was a Negro firemen, nonmember of said Brotherhood. Assignment to said service constituted one of the more preferred assignments available to locomotive firemen employed on defendant railroad. The hours were

shorter and the work less arduous than that required of locomotive firemen who were assigned to other classes of service, particularly yard service. On or about June 1941, the white fireman who had been assigned to said run left it for another assignment, thereby creating a vacancy. In accordance with his individual contract of hiring plaintiff was assigned to said run. He worked said assignment with competence and skill and to the satisfaction of the Railway Company, until on or about October 10, 1941, when the defendant Brotherhood, again fraudently and in breach of its duty as the representative under the Railway Labor Act of the entire craft or class of locomotive firemen, employed by the defendant Railway, did wrongfully press [fol. 11] said agreement and supplement and asserted that the plaintiff's assignment to said run was in breach thereof, and wrongfully induced and forced the defendant Railway Company to remove plaintiff from said assignment and to assign defendant, W. M. Munden, a member of the Brotherhood to same.

11. As a result whereof, plaintiff has lost his assignment on said passenger run and valuable property rights that have accrued to him while in the service of the defendant Railway Company, and in order to continue in his employment, has been forced to accept and perform an assignment in yard service where he has to work longer hours and perform more difficult and arduous labor, and unless this Honorable Court grants relief he will be forced to continue to accept and perform more difficult and arduous labor and will suffer irreparable damage.

12. Plaintiff has requested the defendant Railway Company to restore him to his assignment on the passenger train but said defendant Railway Company asserted that under the provisions of the Railway Labor Act and said agreement entered into pursuant thereto, it is powerless to do so unless plaintiff's representative under the Railway Labor Act, the defendant Brotherhood, demands it. He has requested the Brotherhood as his representative to represent him before the management of the Railway Company for the purpose of having his assignment and property rights restored but said Brotherhood, in violation of its duty has failed and refused to represent him or even to acknowledge his request.

13. The matters and things hereinbefore complained of constitute an actual controversy between plaintiff and the class he represents on the one side and the defendants on the other. The interests of plaintiff and the class he represents are adverse to the interests of the defendants and [fol. 42] those they represent. The right of plaintiff and the class he represents to be represented fairly and impartially and in good faith by the representative under the Railway Labor Act of the entire class or craft of locomotive firemen employed on defendant railroad has been violated and denied and, as a result, damaged incurred, and unless this Honorable Court will declare the rights, interests, and other legal relations of the respective parties, as provided for in Section 400, Title 28, United States Code, and Rule 57 of the Federal Rules of Civil Procedure, numerous vexatious disputes will arise between the parties hereto and those they represent, and plaintiff will suffer irreparable and incalculable injury.

Wherefore, plaintiff prays:

1. A declaratory judgment, binding on all the parties hereto and their privies, settling and declaring the rights, interests and legal relationships of the respective parties in and to and by reason of the matters hereinbefore detailed.

2. A declaratory judgment, that the defendant Brotherhood in accepting the position and acting as the exclusive representative under the Railway Labor Act of the craft or class of locomotive firemen employed by the Norfolk Southern Railway Company, and its predecessors in interest, assumed and is under the obligation to represent fairly and without discrimination all of the members of the said craft or class, including plaintiff and other minority locomotive firemen, nonmembers of said Brotherhood.

3. A permanent injunction against each and all of the defendants restraining and enjoining them and each of them from enforcing or otherwise recognizing the binding effect of the Agreement of February 18, 1941, and the supplement of May 23, 1941, in so far as said agreement and supplement deprives plaintiff of his assignment on the passenger train [fol. 13] run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive firemen employed by the defendant Railway Company.

4. A permanent injunction against the Brotherhood, its officers, agents, or subordinate lodges, their officers and agents, perpetually restraining and enjoining them from acting or purporting to act as plaintiff's representative or the representative of the other Negro firemen under the Railway Labor Act, so long as it or they; or any of them, refuse to represent him and them fairly and impartially; and so long as it or they continue to use its position to destroy the rights of plaintiff and the class he represents herein.

5. Damages against the Brotherhood for its refusal to represent him and the destruction of his rights as a locomotive fireman in the amount of (\$25,000.00) Twenty-Five Thousand Dollars.

6. Restoration of his right to hold his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina.

7. For such other and further relief as to the Court may seem just and proper.

Joseph C. Waddy, 615 F Street, N. W., Washington,
D. C.; Charles H. Houston, 615 F Street, N. W.
Washington, D. C.; Oliver W. Hill, 117 E. Leigh
Street, Richmond, Virginia, Attorneys for Plaintiff

[fol. 14]

EXHIBIT I TO COMPLAINT

Brotherhood of Locomotive Firemen and Enginemen

—General Grievance Committee

—Railway

March 28, 1940.

Mr. _____,

DEAR SIR:

This is to advise that the employees of the — Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen, have approved the presentation of request for the establishment

of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.
2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.
3. When permanent vacancies occur or established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.
4. It is understood that promotable firemen or helpers on other than steam power are those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor Act, kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

[fol. 15] The same request is this date being presented on the following railroads:

Atlantic Coast Line
Jacksonville Terminal
Atlanta Joint Terminal
Atlanta & West Point
Western Railroad of Ala.
Central of Georgia
Frankfort & Cincinnati
Georgia Railroad
Georgia & Florida
Gulf, Mobile & Northern
Louisville & Nashville

Memphis Union Station Co.
Louisiana and Arkansas
Mobile and Ohio, Columbus
& Greenville
Norfolk and Portsmouth Belt
Norfolk & Southern
Norfolk & Western
Seaboard Airline
Southern Railroad System
St. Louis-San Francisco
Tennessee Central

It is our request that all lines or divisions of railway controlled by the —— Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for the purpose of discuss-

ing the proposal. In event settlement is not reached in conference, it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly, (*Signed*) General Chairman.

[fol. 16]

EXHIBIT II TO COMPLAINT

Agreement

Between the Southeastern Carriers' Conference Committee
representing the

Atlantic Coast Line Railway Company

Atlanta & West Point Railroad Company and Western
Railway of Alabama

Atlanta Joint Terminals

Central of Georgia Railroad Company

Georgia Railroad

Jacksonville Terminal Company

Louisville & Nashville Railroad Company

Norfolk & Portsmouth Belt Line Railroad Company

Norfolk Southern Railroad Company

St. Louis-San Francisco Railway Company

Seaboard Air Line Railway Company

Southern Railway Company (including State University
Railroad Company and Northern Alabama Railway
Company)

The Cincinnati, New Orleans and Texas Pacific Railway
Company

The Alabama Great Southern Railroad Company (including
Woodstock and Blackton Railway Company and Belt Rail-
way Company of Chattanooga)

New Orleans and Northeastern Railroad Company

New Orleans Terminal Company

Georgia Southern and Florida Railway Company

St. Johns River Terminal Company

Harriman and Northeastern Railroad Company.
 Cincinnati, Burnside and Cumberland River Railway
 Company
 Tennessee Central Railway Company

and the

Brotherhood of Locomotive Firemen and Enginemen

(1) On each railroad party hereto the proportion of non-[fol. 17] promotable firemen, and helpers on other than steam power, shall not exceed fifty percent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required, in addition showing, in the opinion of the manage-

ment, reasonable proficiency, to take within stated periods to be fixed by the three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

[fol. 18] Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to

promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

[fol. 19] (8) This agreement shall become effective February 22, 1941.

Signed at Washington, D.C., this 18th day of February, 1941.

For the Carriers:

Southeastern Carriers' Conference Committee, C. D. Mackay, Chairman, C. D. Mackay, H. A. Benton, C. G. Sibley, Committee Members.

For the Employees:

Brotherhood of Locomotive Firemen and Enginemen, D. B. Robertson, President; Brotherhood of Locomotive Firemen and Enginemen's Committee, W. C. Metcalfe, Chairman.

[fol. 20]

EXHIBIT III TO COMPLAINT

Supplementary Agreement Effective February 22, 1941, to the Agreement between the Norfolk Southern Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen Dated September 1, 1928.

The purpose of this supplementary agreement is to incorporate as a part of the agreement dated September 1, 1928, between the Norfolk Southern Railroad Company and The Brotherhood of Locomotive Firemen and Enginemen, the agreement reached in mediation and covered by the National Mediation Board Docket Case No. A-905, which agreement reads as follows:

"(1) On each railroad party hereto the proportion of non-promutable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction on which non-promutable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b), men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

[fol. 21] (5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provision.

(6) All persons hereafter hired as firemen shall be required, in addition to showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a

seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination or promotion, or who have not waived promotion, shall [fol. 22] be called in their turn for promotion. When so called should they decline to take such examination or promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employes do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers by other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

The committee representing the firemen requested that paragraphs 1 to 4 of the Mediation Board agreement quoted above be included as a part of this supplementary agreement as provided for in paragraph 5 of said agreement.

The definition and application of the phrases "—each class of service established as such—" contained in the first sentence of paragraph 1 as that the following constitute the classes of service to which paragraph 1 applied:

Passenger

Local Freight

Through Freight

Work, Ballast and Construction

Yard

The provision of paragraph 2 (b) is understood and agreed to mean that not in excess of 50 percent non-promutable men will be assigned to any class of service on any seniority district.

Example 1

In case of only one assignment in any class of service, on any seniority district, and such assignment is filled by a [fol. 23] non-promutable fireman, in the event of the death, dismissal, resignation or disqualification of such non-promutable firemen the assignment would then be filled by a promotable fireman.

Example 2

In case of 4 assignments in any class of service on any seniority district filled by one promotable and 3 non-promutable firemen, in the event of the death, dismissal, resignation or disqualification on one of the non-promutable firemen, the assignment would then be filled by a promotable fireman.

It is understood and agreed that the phrase "—non-promutable fireman—" carried in paragraph 1 of the above quoted agreement refers only to colored firemen.

It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1 and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected.

Norfolk Southern Railroad Company. M. S. Hawkins and, L. H. Windholz, Receivers, (signed) by J. C. Poe, Assistant to General Superintendent.

Accepted for the Firemen: (signed) G. M. Dodson, General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Raleigh, N. C., May 23, 1941.

[fol. 24] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

AFFIDAVIT OF TOM TUNSTALL.

STATE OF VIRGINIA,
City of Norfolk, ss:

Tom Tunstall, plaintiff, being first duly sworn, on oath, states in opposition to the motion of Carl J. Goff:

I, He denies that W. M. Munden, a defendant herein, is not an agent or officer of the defendant Brotherhood of Locomotive Firemen and Enginemen or that his duties are restricted to represent only the Norfolk Southern members of Ocean Lodge No. 76 in the handling of grievances with local officials of the Norfolk Southern Railroad, and states that the defendant Brotherhood as the statutory representative under the Railway Labor Act of the craft or class of locomotive firemen, including plaintiff and the minority non Brotherhood negro firemen on said railroad, has delegated its powers for representing the entire craft or class of firemen on the northern seniority district of the Norfolk Southern Railroad, on which plaintiff works, to the defendant W. M. Munden, local chairman of Ocean Lodge No. 76 for the handling of grievances of the individual members of the craft or class of firemen on said northern seniority district with the local officials of said railroad; that in the premises he acts as agent or officer of the Brotherhood; that as such agent or officer of the Brotherhood he did induce and force the Norfolk Southern Railroad to remove plaintiff from his job assignment as alleged in the complaint.

Tom Tunstall.

Subscribed and sworn to before me this 4th day of March, 1943, Notary Public. My commission expires _____.



[fol. 25] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS UNDER RULE 12 (b)

Now comes defendant, Brotherhood of Locomotive Firemen and Enginemen, a voluntary unincorporated association, by and through D. B. Robertson and Carl J. Goff, its President and Assistant President, respectively, appearing specially for the following purposes and no other, and without intending there-by to make any general appearance in this cause and moves the Court as follows:

I

To dismiss the action so far as concerns this defendant, on the grounds:

- (a) That there has been no service of process on this defendant as appears by the return of the Marshall of the Eastern District of Virginia on the original complaint in this cause;
- (b) That this defendant is a voluntary unincorporated association with its headquarters in the City of Cleveland, in the State of Ohio, and that no officer of said defendant nor any trustee of said defendant has been served with process within the Eastern District of Virginia or elsewhere; all of which more fully appears by the affidavit of [fol. 26] said Carl J. Goff attached to and made a part of this motion;
- (c) That there has been no proper service of process on this defendant;

II

To dismiss the action on the ground that this Court lacks jurisdiction because

- (a) The amount actually in controversy is less than \$3,000 exclusive of interest and costs;
- (b) That the action does not arise under the Constitution or laws of the United States;
- (c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and
- (d) That there is no diversity of citizenship alleged or shown in the complaint.

III

To dismiss the action because the Court lacks jurisdiction over the person of this defendant by reason of the fact that there has been no service on this defendant and this defendant is not before the Court.

Harold C. Heiss, 906 Keith Building, Cleveland, Ohio; Wm. G. Maupin, 415 Bank of Commerce Bldg., Norfolk, Virginia, Attorneys for defendant, Brotherhood of Locomotive Firemen & Engine-men, appearing specially as foresaid.

[fol. 27] IN DISTRICT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA

[Title omitted]

AFFIDAVIT OF CARL J. GOFF

STATE OF OHIO,

Cuyahoga County, ss:

Carl J. Goff, being first duly sworn, deposes and says that he resides in the City of Shaker Heights, County of Cuyahoga, State of Ohio; that he is Assistant President of the Brotherhood of Locomotive Firemen and Engine-men, and that this affidavit is being made for use in connection with the motion to dismiss filed by said Brotherhood in the case of Tom Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, et al., Pending in the District Court of the United States for the Eastern District of Virginia; Norfolk Division, Civil Action File No. 210.

Affiant says that the Brotherhood of Locomotive Firemen and Enginemen, hereinafter called Brotherhood, is a voluntary unincorporated association having its headquarters in the City of Cleveland, Ohio; that it has more than 165,000 members scattered throughout the United States and Canada; that it is a labor organization, international in scope; that its membership is limited to individuals who are engaged either in the United States or Canada in the trade or calling of locomotive engineer or fireman, and [fol. 28] that said association is not organized or operated for pecuniary profit.

Affiant further says that representatives of the membership of said Brotherhood assembled in Convention, there being one representative from each of the more than nine

hundred local lodges of the Brotherhood, elect a corps of officers consisting of the following, to-wit: President, Assistant President, Vice-President-National Legislative Representative for the United States, ten Vice-Presidents, General Secretary and Treasurer and Editor and Manager of the Magazine. That said officers are alone empowered to and do conduct the affairs of the Brotherhood between Conventions, and are its only representatives.

Affiant further says that said local lodges are located at division points on railways throughout the United States and Canada. Each of said local lodges is within itself a separate and distinct voluntary unincorporated association officered and directed by men solely from its own membership and of its own selection. Each of said lodges is itself primarily responsible for the settlement of all its problems or trade disputes arising in its local field.

Affiant further says that W. M. Mundén, one of the named defendants in this cause, is a local chairman of one of such local lodges, to-wit, Ocean Lodge No. 76, which has about 115 members; that said W. M. Mundén is employed by the Norfolk Southern Railroad and is local chairman (which means chairman of the local grievance committee) of said local lodge for the Norfolk Southern Railroad. That said W. M. Mundén is compensated for his services by said local Lodge No. 76 only, from funds collected from the members of said lodge employed on the Norfolk Southern Railroad. That the duties of said W. M. Mundén are to represent only the Norfolk Southern members of said lodge in the handling of grievances with local officials of the Norfolk Southern Railroad, and with no other railroad officials whatever, and that his duties are limited to said business and affairs [fol. 29] of the Norfolk Southern members of said local Lodge No. 76. That said W. M. Mundén was elected at office solely by the Norfolk Southern members of said local Lodge, is responsible only to them and is not an agent, officer, general agent or employee of the Brotherhood, nor does he act for the Brotherhood when enforcing the schedule of rules and job assignments on the northern seniority district of the Norfolk Southern Railroad.

Affiant further says that the funds for defraying the costs and expenses and for carrying out the purposes of local Lodge No. 76 are derived from dues and assessments levied by said local lodge on its members; that funds for

use of the local grievance committee of said Ocean Lodge No. 76, of which W. M. Munden is chairman, are derived from assessments levied solely by the members of said local lodge employed on said Norfolk Southern Railroad upon themselves for the purpose of carrying on the functions of said local grievance committee. That no one other than a member of said lodge employed on the adjacent seniority district of the Norfolk Southern has any voice in the election of, or the term of office of, or direction of duties of said W. M. Munden.

Carl J. Goff.

Subscribed and sworn to before me, a Notary Public in and for said County and state, this 28th day of August, A. D. 1942. C. J. Theis, Notary Public. My commission expires June 17, 1945. [Notarial Seal.]

[fol. 30] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS UNDER RULE 12(b)

Now comes defendant Port Norfolk Lodge No. 775, Portsmouth, Virginia, and moves the Court as follows:

To dismiss the action on the grounds that this Court lacks jurisdiction because:

- (a) The amount actually in controversy is less than \$3,000 exclusive of interest and costs;
- (b) That the action does not arise under the Constitutional or laws of the United States;
- (c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and
- (d) That there is no diversity of citizenship alleged or shown in the complaint.

Harold C. Egiss, 906 Keith Building, Cleveland, Ohio; Wm. G. Maupin, 415 Bank of Commerce Bldg., Norfolk, Virginia, Attorneys for Defendant Port Norfolk, Lodge No. 775, Portsmouth, Virginia.

[fol. 31] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS UNDER RULE 12 (b)

Now comes defendant W. M. Munden, Norfolk, Virginia, and moves the Court as follows:

To dismiss the action on the grounds that this Court lacks jurisdiction because:

- (a) The amount actually in controversy is less than \$3,000.00 exclusive of interest and costs;
- (b) That the action does not arise under the Constitution or laws of the United States;
- (c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and
- (d) That there is no diversity of citizenship alleged or shown in the complaint.

Harold C. Heiss, 906 Keith Building, Cleveland,
Ohio; Wm. G. Maupin, 415 Bank of Commerce
Bldg., Norfolk, Virginia, Attorneys for Defendant W. M. Munden.

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS AND QUASH PURPORTED SERVICE OF
SUMMONS UNDER RULE 12 (b)

Now comes defendant, Ocean Lodge No. 76, Norfolk, Virginia, appearing specially for the following purposes and no other, and without intending thereby to make any general appearance in this cause, and moves the Court as follows:

I

To dismiss the action so far as concerns this defendant and to quash the purported service of summons on this defendant on the grounds that

- (a) This defendant is a voluntary unincorporated association with headquarters in the Eastern District of Vir-

ginea; and that no officer of said defendant, nor any trustee of said defendant has been served with process within the Eastern District of Virginia or elsewhere;

(b) That there has been no proper service on this defendant as appears by the return of the Marshall of the Eastern District of Virginia on the original complaint in this cause.

[fol. 33]

II

To dismiss the action on the grounds that this Court lacks jurisdiction because

(a) The amount actually in controversy is less than \$3,000.00 exclusive of interest and costs;

(b) That the action does not arise under the Constitution or laws of the United States;

(c) That no sufficient basis of Federal jurisdiction is alleged or appears from the complaint; and

(d) That there is no diversity of citizenship alleged or shown in the complaint.

III

To dismiss the action because the Court lacks jurisdiction over the person of the defendant by reason of the fact that there has been no service on this defendant and this defendant is not before the Court.

Harold C. Heiss, 906 Keith Building, Cleveland, Ohio; Wm. G. Maupin, 415 Bank of Commerce Bldg., Norfolk, Virginia, Attorneys for Defendant, Ocean Lodge, No. 76, Norfolk, Virginia.

[fol. 34] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA

[Title omitted]

MOTION TO DISMISS.

Norfolk Southern Railway Company, one of the defendants in the above entitled cause, moves the Court to dismiss the action on the following grounds, to-wit:

1. Because of lack of jurisdiction over the subject matter asserted in the complaint, there being no Federal question involved, nor other reason giving jurisdiction to this Court.
2. Because the Brotherhood of Locomotive Firemen and Enginemen is a necessary party to this action, and has not been brought before this Court, nor process served upon said Brotherhood.
3. Because the complaint does not state a claim upon which relief can be granted, showing no cause of action against this defendant.

(Signed) Jas. G. Martin, Attorney for Norfolk Southern Railway Co., 500 Western Union Bldg., Norfolk, Va.

To the Attorneys for Plaintiff in the above entitled cause.

Take Notice; that the above motion is being filed in said [fol. 35] cause, and will come on for hearing in said Court at a time to be fixed by said Court, of which time notice will be given.

(Signed) Jas. G. Martin, Attorney for Norfolk Southern Railway Co., 500 Western Union Bldg., Norfolk, Va.

Norfolk, Virginia, August 27th, 1942.

This certifies that the above motion was served upon the attorney for the plaintiff in the above entitled cause this day by mailing a copy thereof to Mr. Oliver W. Hill, plaintiff's attorney, 117 East Leigh Street, Richmond, Virginia.

(Signed) Jas. G. Martin, Attorney for Norfolk Southern Railway Co., 500 Western Union Bldg., Norfolk, Va.

[fol. 36] IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA (NORFOLK DIVISION)

Civil Action. No. 210

TOM TUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia, and Ocean Lodge, No. 76, Norfolk,
Virginia, and Port Norfolk Lodge, No. 775, Portsmouth,
Virginia, and W. M. Munden, 1123 Hawthorne Avenue,
Norfolk, Virginia, and Norfolk Southern Railway Com-
pany, a corporation; Norfolk, Virginia, Defendants.

OPINION—April 15, 1943

In the above entitled civil action plaintiff, Tom Tunstall, alleges and sets forth the following cause against the defendants therein named.

That he is a Negro citizen of the United States and the State of Virginia; that the defendant, Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the [fol. 37] Brotherhood) is an international unincorporated association whose membership is derived principally from white firemen and enginemen employed on interstate railroads, including defendant, Norfolk Southern Railway Company, formerly Norfolk Southern Railroad Company (hereinafter referred to as the Railway), and that said Brotherhood is the representative under the Railway Labor Act, 1934, 48 Stat., 1185, U. S. C., Title 45, Chapter 8, of the craft or class of locomotive firemen employed on the Railway. The Brotherhood is composed of a Grand Lodge and over nine hundred subordinate lodges, and defendants, Ocean Lodge, No. 76, and Port Norfolk Lodge, No. 775, are subordinate lodges of the Brotherhood, having their locations in Norfolk and Portsmouth, respectively, within the jurisdiction of this Court. The business of each subordinate lodge is managed by a president, recording secretary, legislative representative, local organizer and local chairman. The members of the defendant subordinate lodges are either employed by the Railway, and directly involved in the matters herein complained of, or are members of the defendant Brotherhood resident within the jurisdiction of this Court.

Defendant, W. M. Munden, is a white locomotive fireman employed by the Railway and a member of the Brotherhood. Because of the wrongs inflicted by the Brotherhood upon plaintiff and his class, Munden has gained certain advantages and considerations which rightfully belong to plaintiff. Munden is local chairman of defendant Ocean Lodge No. 76, and acts for the Brotherhood in enforcing the schedule of rates and working conditions and in matters of grievance adjustments and job assignments on the Northern Seniority District of the Railway. Munden sued in his own right and as a representative of the members of the Brotherhood, particularly those employed on the Railway.

That at all times material herein the Brotherhood has been the representative under the Railway Labor Act before [fol. 38] said of the entire craft or class of locomotive firemen employed by the Railway, and, as such, under a duty under said Act to represent the members of said craft or class impartially and to refrain from using its position to destroy their job assignments and other rights. On or about October 10, 1941, a plaintiff was working for the Railway as a locomotive fireman on a passenger run on its Northern Seniority District, running between Norfolk, Virginia and Marsden, North Carolina, under an individual contract of hiring, and was a member of the craft or class of locomotive firemen employed by the Railway. Said run constituted one of the more preferred jobs available to locomotive firemen employed by said Railway. On or about said October 10, 1941, in order to secure for its own members the more favorable job assignments available to locomotive firemen employed by the Railway, the Brotherhood failed and refused to represent plaintiff impartially as was its duty under the Railway Labor Act, but on the contrary, acting in the premises as representative of the entire craft or class under that Act wrongfully used its position to induce and force the Railway to remove him from his job assignment and replace him with one of the Brotherhood members:

That as a result plaintiff lost his job assignment as a locomotive fireman on said passenger run and, in order to continue in his employment, was forced to accept and perform a less desirable assignment in yard service, where the hours are longer and the work more arduous and difficult.

Plaintiff sues in his individual capacity for wrongs inflicted on his individual rights, and as representative of all of the Negro firemen employed by the Railway. He alleges that the Negro firemen constitute a class too large to be brought individually before the Court, but there are common questions of law and fact involved herein, common grievances arising out of common wrongs, and common relief for the entire class is sought as well as special relief for the plaintiff; and that the interests of said class are fairly and adequately represented by plaintiff.

[fol. 39] The white locomotive firemen, all of whom are members of the Brotherhood, constitute the majority of the total number of locomotive firemen employed by the Railway, and they and the Negro firemen comprise the entire craft or class of firemen employed by the Railway.

By constitutional provision, ritual and practice the Brotherhood restricts its membership to white locomotive firemen, and Negro locomotive firemen, including plaintiff and the class he represents, are all excluded from the Brotherhood solely because of race.

He alleges that by virtue of the fact that they constitute the majority of the total number of locomotive firemen employed by the defendant Railway, the Brotherhood members ever since the passage of the Federal Railway Labor Act, June 21, 1934 (48 Stat., 1185, c. 691, 45 U. S. C., c. g.), have chosen the defendant Brotherhood as the representative of the craft or class of firemen employed on the Railway. The Brotherhood has accepted said position and has ever since claimed the exclusive right to act, and has purported to act as the exclusive bargaining agent and grievance representative of the entire craft or class aforesaid, and its members have individually and collectively claimed the benefits of the actions of the Brotherhood as said representative. Neither plaintiff nor any of the Negro locomotive firemen employed by the Railway has chosen the Brotherhood as his representative but by virtue of the fact that the Brotherhood's members constitute the majority of the craft or class of locomotive firemen, employed by the Railway, plaintiff and the other Negro locomotive firemen, are compelled under the Railway Labor Act, to accept the Brotherhood as their representative for the purposes of the Act.

As members of the craft or class of locomotive firemen employed by the Railway, and being forced by the Railway

Labor Act to accept the representative chosen by the majority as their representative, plaintiff and other Negro locomotive firemen have the right to be represented fairly [fol. 40] and impartially and in good faith by the representative chosen by said majority. By accepting the position of representative under the Railway Labor Act, of the entire craft or class of locomotive firemen, and by asserting the exclusive right to act as such representative, defendant Brotherhood became the statutory agent of plaintiff and the other Negro minority members of said craft or class and under the obligation and duty to represent them fairly and impartially and in good faith; to give them reasonable notice, opportunity to be heard and a chance to vote on any action adverse to their interests proposed by it; to make prompt and full disclosure to all actions taken by it affecting their interests in any way, and to refrain from using its position as their statutory representative to discriminate against them in favor of itself and its members and from destroying their rights. Nevertheless, in violation of its obligations and duties the Brotherhood has been persistently hostile and disloyal to plaintiff and the other minority nonmember Negro locomotive firemen, and has constantly sought to destroy their rights and to drive them out of employment in order to create a monopoly of the employment and the most favored jobs and conditions for its own members. It has always refused and still refuses to notify plaintiff and the other Negro firemen, members of the craft or class, of proposed actions adversely affecting their interests or to give them a chance to be heard or to vote on same. It has constantly refused and still refuses to report to him or them its actions as their statutory representative or to handle their grievances wherever there is an apparent conflict or interest between them and its members; and has always refused and still refuses to give him and them fair, impartial, honest and faithful representation under the Railway Labor Act.

On or about March 28, 1940, the Brotherhood, purporting to act in the premises as the representative under the Railway Labor Act, of the entire craft or class of locomotive firemen employed on the Railway and other railroads [fol. 41] in the southeastern section of the country, but acting in breach of its duties and in fraud of the rights of plaintiff and the other Negro locomotive firemen, mem-

bers of the craft or class, caused notice to be served on said railroads; including the defendant Railway, of its desire and purpose to amend existing collective bargaining agreement covering the standard provisions of the individual hiring contracts of the individual firemen on each railroad, including the defendant Railway, in such manner as would drive the Negro firemen, including plaintiff, completely out of the service of said railroads.

On or about February 18, 1941, pursuant to said notice, the Brotherhood, purporting to act as the exclusive representative under the Railway Labor Act of the entire craft or class of locomotive firemen employed on defendant Railway and other railroads in the southeastern section of the country, did wrongfully prevail upon the Railway to enter into agreement, and did wrongfully negotiate an agreement with the Railway whereby the proportion of non-promutable firemen, and helpers on other than steam power, should not exceed fifty percent in each class of service established as such by the carrier, and providing that until such percentage was reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification should be filled by promotable men; and further providing that non-promutable men are those who were not in line for promotion under the present rules and practices to the position of locomotive engineer.

Plaintiff also alleges that under the rules and practices in effect at the time that this contract was entered into and at the present time, all Negro locomotive firemen, including plaintiff, as a class, are arbitrarily ineligible for the position of locomotive engineer and are arbitrarily classified as non-promutable.

On or about May 23, 1941, the complaint sets forth, the Brotherhood, again purporting to act in the premises as the exclusive representative under the Railway Labor Act of [fol. 42] the entire craft or class, but acting in fraud of the rights of the plaintiff and the other Negro minority firemen, and in breach of its duty to them, caused said agreement to be supplemented to provide specifically that the term "non-promutable firemen" used therein referred only to colored firemen.

In serving said notice of March 28, 1940, and entering into the agreement of February 18, 1941, and supplement of May 23, 1941, the Brotherhood, although purporting to act as the exclusive representative of the entire craft or class of loco-

motive firemen employed by defendant Railway, gave plaintiff and the other Negro minority firemen no notice thereof or opportunity to be heard or vote thereon; nor was the existence of said agreement and supplement disclosed to them until the Brotherhood forced plaintiff off his run by virtue thereof, as hereinafter will appear more fully; but the Brotherhood, well knowing plaintiff's and the other Negro firemen's interest therein, and maliciously intending and contriving to secure a monopoly of employment and the most favorable jobs for its own members, acted in fraud of the rights of plaintiff and the other Negro fireman and failed and refused to represent them fairly and impartially as was its duty as their representative under the Railway Labor Act.

On the date that said agreement and supplement went into effect the Railway operated passenger train service on its northern seniority district, running between Norfolk, Virginia, and Marsden, North Carolina. Two firemen were used in said service, one of whom was a white member of defendant Brotherhood and the other as a Negro fireman, non-member of the Brotherhood. Assignment to said service constituted one of the more preferred assignments available to locomotive firemen employed on the Railway. The hours were shorter and the work less arduous than that required of locomotive firemen who were assigned to other classes of service, particularly yard service. On or about June 1941, the white fireman who had been assigned to said [fol. 43] run, left it for another assignment, thereby creating a vacancy. In accordance with his individual contract of hiring plaintiff was assigned to said run. He worked said assignment with competence and skill and to the satisfaction of the Railway, until on or about October 10, 1941, when the Brotherhood again fraudulently and in breach of its duty as the representative under the Railway Labor Act of the entire craft or class of locomotive firemen, employed by the Railway, did wrongfully press said agreement and supplement and asserted that the plaintiff's assignment to said run was in breach thereof, and wrongfully induced and forced the Railway to remove plaintiff from said assignment and to assign defendant, W. M. Mundon, a member of the Brotherhood, to same. As a result, plaintiff has lost his assignment on said passenger run and valuable property rights that have accrued to him while in the service of the

Railway, and in order to continue in his employment, has been forced to accept and perform an assignment in yard service where he has to work longer hours and perform more difficult and arduous labor, and unless this Honorable Court grants relief he will be forced to continue to accept and perform more difficult and arduous labor and will suffer irreparable damage.

Plaintiff has requested the Railway to restore him to his assignment on the passenger train but the Railway asserts that under the provisions of the Railway Labor Act and said agreement entered into pursuant thereto, it is powerless to do so unless plaintiff's representative under the Railway Labor Act, the Brotherhood, demands it. Plaintiff has requested the Brotherhood as his representative to represent him before the management of the Railway for the purpose of having his assignment and property rights restored but said Brotherhood, in violation of its duty has failed and refused to represent him or even to acknowledge his request.

Plaintiff alleges that the matters and things complained of constitute an actual controversy between him and the class he represents on the one side and the defendants on [fol. 44] the other. The interests of plaintiff and the class he represents are adverse to the interests of the defendants and those they represent. The right of plaintiff and the class of which he is a member, to be represented fairly and impartially and in good faith by the representative under the Railway Labor Act of the entire class or craft of locomotive firemen employed on defendant Railway has been violated and denied and, as a result, damages incurred, and unless this Honorable Court will declare the rights, interests, and other legal relations of the respective parties, as provided for in Section 490, Title 28, United States Code, and Rule 57 of the Federal Rules of Civil Procedure, numerous vexatious disputes will arise between the parties hereto and those they represent, the plaintiff will suffer irreparable injury.

Plaintiff files as exhibits with his complaint, copies of documents which strongly support his allegations. In substance, he prays for a declaratory judgment holding the discrimination against him and other Negro firemen similarly situated to be arbitrary and illegal; for an injunction permanently restraining and enjoining the defendants from recognizing or enforcing the agreement and the supplement thereto, between the Brotherhood and the Railway, and en-

joining the Brotherhood from acting or purporting to act as plaintiff's representative so long as the Brotherhood refuses to represent him and other Negro firemen similarly situated, fairly and impartially, to enjoin the Brotherhood from continuing to use its position of bargaining agent to destroy the rights of plaintiff and other Negro firemen similarly situated, and for a judgment for damages against the Brotherhood because of its refusal fairly to represent him and for damages resulting from the destruction of his rights, and that his right to hold his assignment between Norfolk, Virginia, and Marsden, North Carolina, be restored and protected.

The defendants have filed a motion to dismiss upon the ground, among others, that this Court is without any jurisdiction [fol. 45] of the action alleged in the complaint. It definitely appears from the record that plaintiff, Tom Tunstall, and the defendants, or at least a majority of them, including the Railway, W. M. Mundén, and defendants alleged to be local agents of the Brotherhood, are citizens of Virginia, and that diversity of citizenship between plaintiff and defendants is lacking. Plaintiff bases his claim that this Court has jurisdiction of the action upon the alleged ground that a Federal question is involved, in that the decision of the case turns upon the construction of the *Railway Labor Act of Congress, June 21, 1934*, and upon U. S. C., Title 28, Sec. 41 (8).

The allegations of the complaint may be summarized as follows:

That pursuant to the provisions of the Railway Labor Act of 1934, the Brotherhood has been chosen and is the representative or bargaining agent of the craft or class of enginemen and firemen for the purpose of collective bargaining with the Railway, and has been and is acting as such; that the Brotherhood is composed of white members only and Negro firemen are excluded from membership therein; that a majority of the members of that craft or class are members of the Brotherhood, as a result of which, having a majority of all of the members of the craft or class, the Brotherhood has been selected as its bargaining agent; that under the Railway Labor Act the Brotherhood is sole bargaining agent and the Railway must treat with the Brotherhood only and can not treat with plaintiff or other minority firemen; that the law makes it the duty of the

Brotherhood as such bargaining agent of the craft or class to represent all members thereof fairly and impartially, without regard to whether they are or are not members of the Brotherhood, or minority members of the craft; and that the Brotherhood, acting in its capacity as bargaining agent, has failed and refused to represent the colored firemen fairly and impartially, but, on the contrary, has wrongfully and fraudulently used its position and power as bargaining agent to injure and destroy the rights of plaintiff and other Negro firemen similarly situated, for the benefit of Brotherhood's own members.

The question presented is whether or not the Railway Labor Act, after providing as it does, procedure for selecting a bargaining agent as sole representative of a craft or class and making it the duty of the Railway to recognize and treat with such bargaining agent, stops short without imposing any duty or obligation upon such bargaining agent to represent fairly and impartially the minority as well as the majority members of the craft or class, and without affording any remedy to the minority, in this instance the Negro firemen, for alleged wrongful and fraudulent misrepresentation such as is specifically and directly charged in the complaint.

To state the question another way, are the minority members of a craft or class given any remedy by the Railway Labor Act of 1934, for alleged wrongs committed by the bargaining agent; or is the minority relegated for relief to the law of the state or states in which the wrongs are alleged to have been perpetrated?

As already noted, the Railway Labor Act of 1934 provides for the members of a craft or class of an interstate railway to select a bargaining agent to represent that craft or class for the purpose of collective bargaining, and requires the Railway to recognize and treat with the agent so selected, *Virginian Railway Co. v. System Federation No. 40, etc.*, 309 U.S. 515, affirming *Fourth Cir.*, 84 Fed. 2d., 641, and the Railway can treat only with the agent selected by the craft or class, *Atlantic Coast Line R. Co. v. Pope*, *Fourth Cir.*, 119 Fed. 2d. 39. However, we search the Railway Labor Act in vain for any provision affording protection to the minority against wrongful, arbitrary or oppressive action of the majority through the bargaining agent which the majority has selected. The Act is silent in that respect. It stops short after providing for the selection of the bargaining

[fol. 47] agent, and imposing upon the Railway the duty to treat with that agent alone after he is selected. Numerous authorities were cited and quoted in the arguments, among them *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6th Cir. (1942), 127 Fed. 2d, 53. After a study of that decision, the Court has concluded that it is directly in point in the instant case, and in *Barnhart v. Western Maryland Ry. Co.*, 4th Cir., 128 Fed. 2d, 709, 714, our Circuit Court of Appeals, after discussing and reviewing the authorities generally as to when a Federal question is presented, referred to and quoted the Teague case, as follows:

"Quite in point here is the very recent case of *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 6 Cir. 127 F. 2d, 53, decided April 9, 1942. That was an action by a railway firemen against the Brotherhood (which was designated as collective bargaining agent of his class under the Railway Labor Act) and the railroad, to set aside a collective bargaining agreement on the ground that this agreement was destructive of his vested rights of seniority preference. In the unanimous opinion of the Court, holding that the action did not arise under a federal law, Circuit Judge Simons, 127 F. 2d, 53, 56, said:

"Reverting to the appellant's own statement of his case, such rights as are here claimed arise from the individual contracts of the Negro firemen with the defendant Railroad. The appellant is unable to point to provision of the Railway Labor Act which protects such rights, or permits their invasion. The provisions of Sec. 2, subd. eighth makes the terms of the collective bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law."

It is apparent in the light of these authorities that no Federal question is presented in the present case, and there [fol. 48] being a lack of diversity of citizenship between the plaintiff and defendants, it follows that the motion to dismiss will have to be sustained.

Luther B. Way, United States District Judge.

Norfolk, Virginia, April 15, 1943.

[fol. 49] IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA (NORFOLK DIVISION)

Civil Action No. 210

TOM TUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia, and Ocean Lodge, No. 76, Norfolk,
Virginia, and Port Norfolk Lodge, No. 775, Portsmouth,
Virginia, and W. M. Munden, 1123 Hawthorn Street,
Norfolk, Virginia, and Norfolk Southern Railway Com-
pany, a Corporation, *a Corporation*, Norfolk, Virginia,
Defendants.

DECREE OF DISMISSAL—May 7, 1943

This action came to be heard on March 4, 1943, upon the complaint, the motion of defendant Brotherhood of Locomotive Firemen and Enginemen, to dismiss the action under Rule 12 (b) of the Rules of Civil Procedure; the motion of defendant Ocean Lodge No. 76, Norfolk, Virginia, to dismiss the action and quash purported service of summons [fol. 50] under Rule 12 (b), the motion of Port Norfolk Lodge, No. 775, Portsmouth, Virginia, to dismiss said action under Rule 12 (b), the motion of defendant W. M. Munden to dismiss said action under Rule 12 (b), and motion of defendant Norfolk Southern Railway Company to dismiss said action, all of which motions were considered and fully argued and submitted to the Court on March 4, 1943. And the Court not being fully advised of its judgment, took time to consider.

And the Court being now fully advised of its judgment upon all the motions pending herein, is of the opinion that the said defendants, namely; Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, William M. Munden and the Norfolk Southern Railway Company, have been duly served and are properly before the Court; but, being of the opinion that no federal question is presented in this case, and that there is no jurisdiction in this Court to hear and decide this case, it is therefore Ordered, Adjudged and Decreed:

1. That the motion of the defendant Brotherhood of Locomotive Firemen and Enginemen to dismiss the

action against it on the ground that there has been no service of process upon said defendant, be, and the same is overruled.

2. That the motion of defendant Ocean Lodge No. 76, Norfolk, Virginia, to dismiss the action so far as concerns said defendant and to quash the purported service of summons upon said defendant, be, and the same is overruled.

3. That the said motions filed herein as aforesaid by Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, William M. Munden and the Norfolk Southern Railway Company, be and the same are hereby sustained in so far as the said motions are based upon a lack of jurisdiction in this Court.

[fols. 51-52] 4. That judgment be entered against the plaintiff, Tom Tunstall, and for the defendants, Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, W. M. Munden and Norfolk Southern Railway Company, and that plaintiff's complaint be and the same is hereby dismissed with costs to the defendants.

To the action of the Court in denying its motion to dismiss the action against it on the ground that it had never been served with summons, the defendant Brotherhood of Locomotive Firemen and Enginemen duly objected and excepted upon grounds fully stated to the Court; and to the action of the Court in denying its motion to dismiss the action as to it, and to quash the purported summons of service upon it, the defendant Ocean Lodge No. 76, Norfolk, Virginia, duly objected and excepted upon grounds fully stated to the Court; and to all of the actions of the Court in sustaining said motions of the defendants to dismiss the complaint and entering judgment against the plaintiff and for the defendants, the plaintiff duly objected and excepted upon grounds fully stated to the Court.

_____, United States District Judge.
Norfolk, Virginia, May 7, 1943.

[fol. 53] APPENDIX TO BRIEF OF APPELLEES, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, AND W. M. MUNDEN

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, (NORFOLK DIVISION)

Civil Action No. 210

TOM PUNSTALL, Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Norfolk, Virginia,

and

OCEAN LODGE NO. 76, Norfolk, Virginia,

and

PORT NORFOLK LODGE NO. 775, Portsmouth, Virginia,

and

W. M. MUNDEN, 1123 Hawthorn Avenue, Norfolk, Virginia,

and

NORFOLK SOUTHERN RAILWAY COMPANY, a Corporation,
Norfolk, Virginia, Defendants

(Filed at Norfolk, Va., August 11, 1942)

Return of United States Marshal for the Eastern District of Virginia of Service of Summons and Complaint as to Defendant Brotherhood of Locomotive Firemen and Enginemen.

[fol. 54] "Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representative in this District."

R. L. Allworth, U. S. Marshal, by H. L. Trimyer,
Deputy U. S. Marshal.

Return of United States Marshal for the Eastern District of Virginia of Service of Summons and Complaint as to Defendant Ocean Lodge No. 76.

"Not finding any representative of the within named Lodge (Ocean Lodge No. 76) I served a copy of the Summons together with a copy of the Complaint, by delivering same to Lucile Munden, she being the wife of W. M. Munden, and above the age of sixteen years and a member of his family at his regular place of abode at 1123 Hawthorne Avenue, South Norfolk, Va. for delivery to the within named W. M. Munden at his regular place of abode, a place within my District.

R. L. Ailworth, United States Marshal, by H. L. Trijiver, Deputy U. S. Marshal."

[fol. 55] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5125

TOM TUNSTALL, Appellant,

versus.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN; Ocean Lodge No. 76; Port Norfolk Lodge No. 775; W. M. Munden; and Norfolk Southern Railway Company, Appellees

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

June 28, 1943, the transcript of record is filed and the cause docketed.

Same day, the appearance of Charles H. Houston is entered for the appellant.

Same day, the appearance of Wm. G. Maupin, Harold C. Heiss and Russell B. Day is entered for the appellees.

Same day, the appearance of James G. Martin is entered for the appellee Norfolk Southern Railway Company.

June 29, 1943, the appearance of Joseph C. Waddy is entered for the appellant.

Same day, statement under section 3 of rule 10 is filed.

September 14, 1943, brief and appendix on behalf of the appellant are filed.

September 28, 1943, brief and appendix on behalf of the appellees other than the Norfolk Southern Railway Company are filed.

September 29, 1943, brief on behalf of appellee Norfolk Southern Railway Company is filed.

[fol. 56] Argument of Cause

October 15, 1943, (October term, 1943) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 57] PER CURIAM OPINION—Filed January 10, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5125

TOM TUNSTALL, Appellant,

VERSUS

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN; Ocean Lodge No. 76; Port Norfolk Lodge No. 775; W. M. Munden; and Norfolk Southern Railway Company, Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued October 15, 1943. Decided January 10, 1944)

Before Parker, Soper and Dobie, Circuit Judges

Charles H. Houston and Joseph C. Waddy (Oliver W. Hill on brief) for Appellant; and William G. Maupin and James G. Martin (Harold C. Heiss and Russell B. Day on brief), for Appellees.

[fol. 58] PER CURIAM:

This is an appeal from an order dismissing a suit for lack of jurisdiction. Plaintiff is a Negro fireman employed by the Norfolk-Southern Railway Company and he brings the suit in behalf of himself and other Negro firemen em-

ployed by that company. The defendants are the railway company, the Brotherhood of Locomotive Firemen and Enginemen, certain subordinate lodges of that labor union and one of its officers. The gravamen of the complaint is that the union has been selected as bargaining agent of the firemen of the defendant railway company; that it excludes Negro firemen from membership; that it has negotiated a trade agreement with the company discriminating against Negro firemen; and that as a result of this agreement plaintiff has suffered discrimination with respect to seniority rights and has been damaged thereby. The relief asked is a declaratory judgment to the effect that the union as bargaining representative is bound to represent fairly and without discrimination all members of the craft, and injunction restraining the defendants from giving effect to the trade agreement in so far as it discriminates against Negro firemen and restraining the union from acting as bargaining representative of Negro firemen so long as it refuses to represent them fairly and impartially, an award against the union for damages sustained by plaintiff, and an order that plaintiff be restored to the position to which he would be entitled by seniority in absence of the contract.

There is no allegation of diversity of citizenship, and jurisdiction of the suit can be maintained only on the ground that the controversy is one arising under the laws of the United States. In so far as the suit is grounded on wrongful acts of the defendants, it cannot be said to be one arising under the laws of the United States, even though ~~(4059)~~ the union was chosen as bargaining representative pursuant to such laws. *Barnhart v. Western Maryland Ry. Co.*, 4 Cir., 128 F.2d 709; *Teague v. Brotherhood of Locomotive Firemen and Enginemen* 6 Cir., 127 F.2d 53. We have considered whether jurisdiction might not be sustained for the purpose of declaring the rights of plaintiff to the fair representation for the purposes of collective bargaining which is implicit in the provisions of the National Railway Labor Act. We think, however, that recent decisions of the Supreme Court hold conclusively that there is no jurisdiction in the federal courts to afford relief under the act except where express provisions of the ~~act~~ so indicate. *Brotherhood of R.R. S. S. Clerks etc. v. United Transport Service Employees of America* (decided Dec. 6, 1943) U. S. —; *Switchmen's Union of North America etc. v. Na-*

tional Mediation Board et al. (decided Nov. 22, 1943) — U. S. —, 64 S. Ct. 95; *General Committee etc. v. Southern Pac. Co.* (decided Nov. 22, 1943) — U. S. —, 64 S. Ct. 142; *General Committee etc. v. Missouri-Kansas-Texas Railroad Co. et al.* (decided Nov. 22, 1943) — U. S. —, 64 S. Ct. 146. In the case last cited, the Supreme Court, after commenting upon various provisions of the act and the machinery provided for their enforcement, said:

"The new administrative machinery plus the statutory commands and prohibitions marked a great advance in supplementing negotiation and self-help with specific legal sanctions in enforcement of the Congressional policy."

"But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by sec. 5, First, Congress provided that either party to a dispute might invoke the services of the Mediation Board in a 'dispute concerning [fol. 60] changes in rates of pay, rules, or working conditions not adjusted by the parties in conference' and any other 'dispute not referable' to the Adjustment Board and 'not adjusted in conference between the parties or where conferences are refused.' Beyond the mediation machinery furnished by the Board lies arbitration. See 5, First and Third, sec. 7. In case both fail there is the Emergency Board which may be established by the President under sec. 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway-labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than*

"the express provisions of the Act indicate," (Italics supplied.)

Closely analogous to the case at bar is the case of *General Committee, etc. v. Southern Pac. Co., supra*. That was a suit for declaratory judgment that provisions of an agreement between a carrier and a committee representing firemen concerning the demotion of engineers to firemen and the calling of firemen for service as emergency engineers were invalid under the Railway Labor Act. Complainants there based their right to relief upon the same provisions of the Act guaranteeing employees the right to bargain collectively through representatives of their own choosing as are relied on here; but the Court held that the questions presented were not justiciable issues under the Act. The Court said:

[fol. 61] "We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the Missouri-Kansas-Texas R. Co. case. It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the Missouri-Kansas-Texas R. Co. case and in the Switchmen's case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others."

If the courts are without power under the provisions of the Act, relied on to declare a contract void because the association which negotiated it was not authorized to represent complainants, they are equally without power to make such declaration where the complaint is that it has not represented them fairly. If the courts may not under the act declare where the exclusive jurisdiction of one craft ends and the authority of another begins with respect to the right of collective bargaining, a fortiori they are with-

out power to declare the duties of a bargaining agent within the limits of his undoubted jurisdiction. It would be absurd to hold that the courts have power to declare a contract void because the bargaining agent has not properly and impartially represented different groups of employees, but are without power where he is not authorized to represent them at all. If the courts may not make a determination between conflicting rights of organized groups, it is difficult to see how their power should be extended by the mere fact that one of the groups is unorganized.

[fol. 62] The court here is asked, in enforcement of the provision of the Act that employees shall have the right to bargain collectively through representatives of their own choosing, to declare the duty of a representative admittedly chosen by a majority of the craft, and to interfere by injunction with the process of bargaining undertaken pursuant to the Act on the ground that the purposes of the Act are being violated. This, as we interpret the foregoing decisions of the Supreme Court, we have no power to do.

The decree dismissing the suit will be affirmed.

Affirmed.

[fol. 63] DECREE—Filed and Entered January 10, 1944

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5125

TOM TUNSTAL, Appellant,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS;
Ocean Lodge No. 76; Port Norfolk Lodge No. 775; W. M.
Minden; and Norfolk Southern Railway Company, Ap-
pellees

Appeal From the District Court of the United States for
the Eastern District of Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of dismissal of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

January 10, 1944.

John J. Parker, Senior Circuit Judge.

February 8, 1944, petition of appellant for a stay of the mandate is filed.

**ORDER STAYING MANDATE PENDING APPLICATION FOR A WRIT
OF CERTIORARI—Filed February 10, 1944**

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by his counsel, Joseph ~~W~~addie and Charles H. Houston, and for good cause shown,

It is Ordered that the mandate in this court in the above entitled cause be, and the same is hereby, stayed pending [feb 64] the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within thirty days from this date.

February 9, 1944.

Armistead M. Dobie, U. S. Circuit Judge.

**STIPULATION GOVERNING CONTENTS OF RECORD RE APPLICA-
TION TO THE UNITED STATES SUPREME COURT FOR WRIT
OF CERTIORARI—Filed March 7, 1944**

(Style of Court and Title Omitted)

It is stipulated among counsel for all the respective parties that the record for use on application to the United States Supreme Court for writ of certiorari shall consist of the Appendix to the Appellant's Brief filed herein and the proceedings in the United States Circuit Court of Ap-

peals for the Fourth Circuit, and the appendix to the brief of appellees BLF&E filed therein.

Dated this 3rd day of March, 1944.

Joseph C. Waddy, Charles H. Houston, Attorneys for Appellant Tunstall, 615 F Street, N. W., Washington, D. C. Wm. G. Maupin, Attorneys for appellees Brotherhood of Locomotive Firemen & Enginemen; Ocean Lodge No. 76; Port Norfolk Lodge No. 775; and W. M. Munden, Bank of Commerce Building, Norfolk, Virginia. Jas. G. Martin, Attorney for appellee Norfolk Southern Railway Company, Western Union Building, Norfolk, Virginia.

[fol. 65] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief for appellant; appendix to brief of appellees Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden; and the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals; and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 7th day of March, A. D., 1944.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. By R. M. F. Williams, Jr., Deputy Clerk. (Seal.)



[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Charles H. Houston File No. 48,272 U. S. Circuit Court of Appeals, Fourth Circuit, Term No. 37, Tom Tunstall, Petitioner vs. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 10, 1944. Term No. 37 O. T. 1944.

(2554)